

a JOHOR COASTAL DEVELOPMENT SDN BHD

v.

CONSTRAJAYA SDN BHD

b COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: J-02-742-2001]
c 14 JANUARY 2005

c **CONTRACT:** *Deposit - Forfeiture - Whether sum subject to forfeiture a true deposit or a penalty - Whether sum of 12% of purchase price a fair and reasonable deposit*

d **CONTRACT:** *Breach - Damages - Recoverability of penalty or liquidated damages - Whether proof of actual damage a prerequisite to recoverability*

CONTRACT: *Construction - Deposit paid, whether forfeitable - Whether deposit a true deposit or penalty*

e **CONTRACT:** *Construction - Ambiguity in contract - Contra proferentum rule - Application of*

The appellant/vendor entered into two contracts with the respondent/purchaser. Under each of these agreements, the respondent purchased land from the appellant and undertook to construct buildings on them in accordance with the plans prepared and provided by the appellant. The purchase price for the land was to be paid by instalments. The respondent made an initial payment or a 'first payment' of 12% of the purchase price and then made subsequent payments amounting in total to about 50% of the purchase price under both agreements. The respondent then defaulted. The appellant held the respondent in breach of the agreements and forfeited all the moneys paid. The respondent sought to recover all the money it had paid the appellant. At first instance, the judicial commissioner held that the respondent was entitled to recover the whole sum paid by it and granted the appropriate relief. The appellant appealed to the Court of Appeal against that order. There were two issues before the Court of Appeal. First, whether the 12% paid by the respondent was a true deposit. This turned upon a true construction of the agreements. Second, whether the appellant could keep for itself the whole of the 50% it was paid without proof of actual damage. Counsel for the appellant argued that the appellant was entitled to retain the whole of the forfeited sum without proof of damage because of cl. 16.2 of the agreements. According to appellant's

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counsel, the parties, by virtue of cl. 16.2, had excluded the application of s. 75 of the Contracts Act 1950. It was therefore not open to the respondent to demand the return of any part of the moneys paid. a

Held (allowing the appeal in part)
Per Gopal Sri Ram JCA delivering the judgment of the Court of Appeal: b

[1] The ‘first payment’ or 12% of the purchase price was nowhere described in the agreement as a forfeitable deposit. According to cl. 8.2(b) the appellant would get to keep the 12% unless the default occurred within four months in which case the appellant would forfeit only 10%. According cl. 8.2(b), the function of the first payment was to secure the future performance of the contract. This is exactly what a true deposit does. What the parties had described in their agreements as a first payment was therefore, when the agreements were construed as a whole, in reality a true deposit. By virtue of cl. 8.2 the appellant was to forfeit it. The 12% was not in law a penalty. (pp 920 b-g & 921 a-b) c
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[2] The fact that the deposit was 12% did not make the deposit unusual or extortionate in the circumstances of the case. The peculiar facts of the instant case made the 12% a fair and reasonable deposit which the appellant could forfeit. The Court of Appeal could not therefore agree with the finding of the judicial commissioner that the appellant had to disgorge the 12%. (p 921 c-d) e

[3] The Court of Appeal would agree with the judicial commissioner that the appellant could not keep the whole of the 50% (less the deposit) without proof of loss. Section 75 of the Contracts Act 1950 does not apply to a true deposit. This may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage suffered by a vendor. However, any further sum paid towards the balance of the purchase price can only be forfeited upon proof of actual damage. In the present case, the appellant was only entitled to forfeit the balance of the sums paid if it proved damage. There was no such proof. As such it was obliged to return those moneys to the respondent. (pp 921 e-g & 922 a-h) f
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[4] When the agreements were read as a whole, what cl. 16.2 meant was that the 10% or 12% which was to be forfeited by the appellant was not to be challenged by the respondent as not being fair and reasonable compensation. Both parties knew that this was not a straightforward sale and purchase of land. There were other considerations in the instant case. The appellant as vendor of the land obviously did not want to face a h

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a challenge that it ought not to keep any of the sums it had received from the respondent on the ground that this was not an outright sale and purchase. That was why cl. 16.2 was crafted the way it was. (p 925 f-g)

b [5] Even if there were to be any ambiguity between cls. 8.2 and 16.2, since it was the appellant who relied on cl. 16.2 to justify the forfeiture, that clause should be read *contra proferentum* the appellant and the resulting ambiguity between cl. 16.2 and cl. 8.2 had to be resolved in the respondent's favour. What that meant was that it was not open for the appellant to keep all the moneys. (p 926 b)

c [*Bahasa Malaysia Translation Of Headnotes*]

d Perayu-penjual memeterai dua perjanjian dengan responden-pembeli. Di bawah setiap satu perjanjian, responden membeli tanah dari perayu dan berjanji untuk membina bangunan-bangunan di atasnya sesuai dengan pelan yang disediakan perayu. Harga belian tanah adalah dibayar secara ansuran. Responden membuat bayaran permulaan atau 'bayaran pertama' sebanyak 12% dan berikutnya membuat bayaran tambahan sehingga ke 50% harga belian di bawah kedua-dua perjanjian. Perayu mendakwa bahawa responden telah mengingkari perjanjian-perjanjian dan berikutnya telah merampas kesemua jumlah wang yang dibayar responden. Di hadapan pesuruhjaya kehakiman, mahkamah *e* mendapati bahawa responden berhak mendapat balik jumlah yang dirampas sekaligus membenarkan relif-relif sewajarnya. Perayu merayu ke Mahkamah Rayuan terhadap perintah tersebut. Terdapat dua isu di hadapan Mahkamah Rayuan. Pertama, sama ada jumlah 12% yang dibayar responden merupakan deposit sebenar. Ini melibatkan pentafsiran sebenar perjanjian-perjanjian. Kedua, *f* sama ada perayu boleh mengambil keseluruhan jumlah 50% yang dibayar kepadanya tanpa bukti kerugian sebenar. Peguam perayu berhujah bahawa perayu berhak mengambil keseluruhan 50% bayaran tanpa perlu membuktikan kerugian sebenar berdasarkan fasal 16.2 perjanjian-perjanjian. Menurutnya lagi, melalui fasal 16.2, pihak-pihak telah menyingkir pemakaian s. 75 Akta Kontrak *g* sekaligus menjadikan tidak terbuka kepada responden untuk menuntut pemulangan apa jua jumlah wang yang telah dibayar.

Diputuskan (membenarkan rayuan sebahagiannya)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman Mahkamah Rayuan:

h [1] Tiada suatu apa pun di dalam perjanjian yang menyatakan bahawa 'bayaran pertama' atau 12% harga belian itu adalah deposit yang boleh dirampas. Menurut fasal 8.2(b), perayu akan menyimpan jumlah 12% tersebut kecuali jika keingkaran berlaku dalam masa empat bulan dalam hal mana perayu *i* akan hanya merampas 10%. Mengikut fasal 8.2(b), tugas Bayaran Pertama

- adalah untuk memastikan pematuhan seterusnya kontrak. Inilah yang dibuat oleh deposit sebenar. Oleh itu, menilai perjanjian secara keseluruhannya, apa yang dithuraikan sebagai Bayaran Pertama oleh pihak-pihak di dalam perjanjian, adalah sebenarnya suatu deposit. Maka perayu berhak untuk merampasnya. Jumlah 12% tersebut bukanlah suatu penalti. a
- [2] Fakta bahawa deposit adalah sebanyak 12% tidak menjadikannya luar biasa atau suatu penganiayaan. Mengambil kira fakta-fakta khusus kes, jumlah 12% adalah satu deposit yang munasabah dan adil dan boleh dirampas oleh perayu. Mahkamah Rayuan dengan itu tidak dapat menyetujui keputusan pesuruhjaya kehakiman bahawa perayu perlu memulangkan jumlah 12% tersebut. b
- [3] Mahkamah Rayuan bersetuju dengan pesuruhjaya kehakiman bahawa perayu tidak boleh mengambil kesemua 50% (ditolak deposit) tanpa bukti kerugian. Seksyen 75 Akta Kontrak tidak terpakai kepada deposit sebenar. Ia boleh dirampas jika berlaku keingkaran kerana itu menandakan anggaran awal kerugian sebenar yang dialami penjual. Bagaimanapun, mana-mana jumlah lain yang dibayar untuk baki harga belian hanya boleh dirampas jika wujud bukti kerugian sebenar. Dalam kes semasa, perayu hanya berhak merampas baki jumlah yang dibayar jika kerugian dibuktikan. Bukti sedemikian tidak ada. Oleh itu perayu bertanggung untuk memulangkan wang tersebut kepada responden. c
- [4] Membaca perjanjian pada keseluruhannya, apa yang dimaksudkan fasal 16.2 adalah bahawa jumlah 10% atau 12% yang dirampas tidak akan dicabar oleh responden sebagai suatu pampasan yang tidak adil atau tidak munasabah. Kedua-dua pihak menyedari bahawa ini bukanlah suatu jual beli tanah biasa. Terdapat beberapa pertimbangan lain dalam kes ini. Perayu sebagai penjual tanah tentunya tidak mahu dicabar bahawa ia tidak boleh menyimpan mana-mana jumlah yang telah diterimanya dari responden atas alasan bahawa ini bukan satu kes jual beli semata-mata. Inilah sebabnya mengapa s. 16.2 diolah dengan sebegitu rupa. d
- [5] Jikapun terdapat kesamaran antara fasal 8.2 dan 16.2, oleh kerana perayu bergantung kepada fasal 16.2 bagi menjustifikasikan rampasan, maka fasal tersebut hendaklah dibaca mengikut kaedah *contra proferentum*, berakibat kesamaran yang timbul antara fasal 16.2 dan 8.2 perlu diputuskan secara yang memanfaatkan responden. Maksudnya perayu tidak boleh menyimpan keseluruhan jumlah wang. e
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a Case(s) referred to:

Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA (**refd**)

Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 (**refd**)

Stockloser v. Johnson [1954] 1 QB 476 (**refd**)

Sun Properties Sdn Bhd v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423; [1987]

CLJ (Rep) 345 SC (**refd**)

b *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294 (**refd**)**Legislation referred to:**

Contracts Act 1950, s. 75

Contract Act 1872 [India], s. 74

c *For the appellant - Vinayak Pradaan (Jack Siose & Pathmavathy with him);*

M/s Edwin Lim & Co

For the respondent - RR Sethu (Jeev Anand with him); M/s How, Zul & Tan

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-1265-2000(1)]

d *Reported by Andrew Christopher Simon***JUDGMENT****Gopal Sri Ram JCA:**

e This is a tolerably plain case. We were prepared to deliver our decision at the close of arguments on 12 January. However, in deference to the careful arguments advanced by Mr Vinayak Pradhan of counsel for the appellant we reserved judgment to today. The factual matrix relevant to this appeal is as follows.

f The appellant entered into two even dated agreements with the respondent. Both agreements contain the same terms. Under each of these agreements the respondent purchased land from the appellant and undertook the further obligation to construct buildings on them in accordance with the plans prepared and provided by the appellant. The appellant's aim was to have a sea front project in Johor Baru for aesthetic improvement of that city. The purchase price

g for the land was to be paid by instalments. As to what would happen in the event of a justified termination of the agreements by the appellant is provided for in two clauses in the agreements. They are cls. 8.2(b) and 16.2. They are important. And this is what they say:

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8.2 Consequences of termination of Agreement

Upon the termination of this Agreement under Section 8 1(B) hereof and without prejudice to any other remedies which the Vendor is entitled under this Agreement:

(a) ...

(b) All instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement, in which event an amount equal to ten per centum (10%) of the Purchase Price shall be forfeited to the Vendor absolutely, and all instalments previously paid by the Purchaser to the Vendor including the First Payment after deducting the amount forfeited shall be returned to the Purchaser, without interest;

16.2 Reasonable Compensation

Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

It is common ground that the respondent made an initial payment of 12 % and then made subsequent payments amounting in total to about 50% of the purchase price under both agreements and then made default. The appellant held the respondent in breach of the agreements and forfeited all the monies paid. The respondent commenced proceedings by originating summons and sought to recover all the money it had paid the appellant. The learned judicial commissioner who heard the summons held that the respondent was entitled to recover the whole sum paid by it and granted the appropriate relief. The appellant has appealed to us against that order.

There are two issues before us. First, whether the 12% paid by the respondent is a true deposit. This turns upon the true construction of the agreements. Second, whether the appellant may keep for itself the whole of the 50% it was paid without proof of actual damage. This is a point of law which in our view is covered by high authority.

Before we deal with the first issue we must observe that the agreements in question are unhappily drafted. They contain clauses that conflict with each other or are tautologous. There are also ambiguities. For example, cl.e 2.2 of the agreements makes their validity dependent upon the respondent making what is described as “the First Payment” within three months from the date

- a* of the agreements. “First Payment” is described in item 5 of the First Schedule as RM918,000 which works out to 12% of the purchase price. However, item 1 of the Second Schedule appears to require the first payment to be made immediately upon the execution of the agreements. In these circumstances, we are driven to do the best we can to interpret them.
- b* Now, nowhere in these agreements do they describe the first payment as a forfeitable deposit. Mr Pradhan argues that this is a mere question of labelling and that the law does not concern itself with labels. This submission in our judgment has merit. You will find many cases in the Law Reports that illustrate the point made by counsel. *Yeoman Credit Ltd v. Latter & Anor*
- c* [1961] 2 All ER 294 is an example that readily springs to mind. There, a document was labelled by the parties as a guarantee. That did not prevent the court from examining its contents and coming to the conclusion that the document on its proper construction was in truth an indemnity.
- d* So too here. Look what happens if the respondent defaults. According to cl. 8.2 (b) the appellant gets to keep the 12% unless the default occurs within 4 months in which case he forfeits only 10%. According to this clause, the function of the first payment is to secure the future performance of the contract. Now, that is exactly what a true deposit does. As for authority on the point, you do not have to go beyond what Hashim Yeop Sani SCJ said in
- e* *Sun Properties Sdn Bhd v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345, a case referred to by the learned judicial commissioner in his judgment in this case:
- f* A deposit is not merely a part payment but is also an ‘earnest’ money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract – see *Howe v. Smith* [1884] 27 Ch D 89, 101. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business – per Lord MacNaghten in *Soper v. Arnold* [1889] 14 App Cas 429.
- g* What the parties have described in their agreements as a first payment is therefore, when these agreements are construed as a whole, in reality a true deposit. And, in accordance with cl. 8.2 the appellant is to forfeit it. The 12% is not treated by the law as a penalty. Once again we quote from the judgment of Hashim Yeop Sani SCJ said in *Sun Properties Sdn Bhd v. Happy Shopping Plaza Sdn Bhd*:
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The crux of the matter here is whether the \$1,000,000.00 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum is irrecoverable by the respondent and it can lawfully be forfeited by the appellants. The fact that the amount is \$1,000,000.00 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit and as Lord Hailsham LC said in *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89:

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There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.

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We may add that the fact that the deposit here is 12% does not make the deposit unusual or extortionate in the circumstances of this case. The appellant was not engaged in a mere sale and purchase transaction of land. There were other considerations here. A project was being launched to improve the skyline of a city; to architecturally enhance the beauty of a city. One can well imagine what would happen if individual developers to whom the land was sold begin to abandon construction mid-way. It would strike at the very objective aim of the whole scheme. The appellant will have to retrieve from the respondent the plans that had been drawn for a composite development and go about looking for a more reliable developer. All these and the other peculiar facts of this case make the 12% a fair and reasonable deposit which the appellant may forfeit. We therefore cannot agree with the finding of the learned judicial commissioner that the appellant must disgorge the 12%.

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That brings us to the second issue. Can the appellant keep the whole of the 50% (less the deposit) without proof of loss? Learned counsel for the appellant says that it can. The judicial commissioner held that it cannot. We agree with the learned judicial commissioner. There is no necessity to cite copious authorities. The relevant provision is s. 75 of the Contracts Act 1950 which is ipsissima verba s. 74 of the Indian Contract Act 1872. The section reads as follows:

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75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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- a* The way in which the section is to be applied has been settled beyond argument by two decisions of the Privy Council. The first is *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89 where Lord Hailsham when speaking of the Indian equipollent said that:
- b* section 74 of the Contract Act (as amended) had no application to the forfeiture by a vendor of a reasonable deposit in a contract for the sale of land. The reason in substance was that, though it is true that section 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered, these technical rules
- c* had developed entirely separately from the law relating to deposits and for a very long time no one thought that the section in the Contract Act which superseded them had any application to the deposit cases, or, at least, wherever the point was argued, it was rejected by the Indian courts.
- d* The second is *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 179. In that case, the purchaser had paid two sums to the vendor, a deposit of Rs 500 and a further sum of Rs 10,000. On the purchaser making default in completing the sale, the vendor purported to forfeit both sums. The Privy Council upheld the forfeiture of the deposit. In respect of the second sum this is what Lord Atkin who delivered the advice of the Board said:
- e* The effect of s. 74 of the Contracts Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs 10,000 whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. The only evidence of loss is that of the loss on resale by Rs 1,000. There seems to be no ground for displacing the trial judge's finding that this was a genuine contract. The vendors remained in possession of the rents and profits of the property until resale, amounting, according to the evidence, Rs 450 to 500 per mensem. There is no ground for awarding them interest. On the other hand, they have received earnest money Rs 500 so that their actual damage is Rs 500.
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- g* The upshot of these two decisions is that s. 75 does not apply to a true deposit. This may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage suffered by a vendor. However, any further sum paid towards the balance of the purchase price can only be forfeited upon proof of actual damage. So, in the present case the appellant is only entitled to forfeit
- h* the balance of the sums paid if it proved damage. Needless to say there was no such proof. As such it was obliged to return those monies to the respondent.
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That should really be sufficient to dispose this appeal. But there are two arguments raised before us that we must perforce deal with. The first is the submission by learned counsel for the respondent that the judicial commissioner was correct in directing the appellant to return all monies. According to Dato' Sethu, the appellant had a choice of two courses open to it. It could have forfeited the 12% and refunded the balance. Or it could have held onto the whole sum. Since it chose the latter course, it must refund the whole sum. We trust that we must be forgiven if we find this argument incomprehensible.

As to the choices open to an innocent party when a contract is broken, this was dealt with by this court in *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629 as follows:

When the vendor's solicitors stated in their letter of 31 July 1986 their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the sale and purchase agreement. Once he received that intimation, the appellant had at least two alternatives open to him. These alternatives appear in s 40 of the Contracts Act 1950 which is in the following terms:

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

The other way of stating the rule is this. An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing and sue for specific performance.

There is, in my judgment, yet a third option available to the innocent party. It is the common law right of rescission, akin to but much narrower than its equitable counterpart. In the present case the appellant clearly made his election to rescind the sale and purchase agreement. Hence his demand for the return of the RM10,000. What he was in fact asking was a restoration of the status quo ante.

Having made this choice, he is bound by it. That much is clear from the judgment of Mason J (later CJ Australia) in *Sargent v. ASL Developments Ltd* [1974] 131 CLR 634 at p 655 where he said:

It will make for greater certainty, therefore, if the present cases are regarded as cases of election. A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of

- a** the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach – in each instance the alternative right to insist on performance creates a right of election.
- b** Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*R v. Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v. Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.
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Later, his Honour said (at p 658):

- d** For my part this proposition correctly states the law in its application to contracts as well as interests in property. If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct
- e** is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his
- f** alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier, the affirming
- g** party cannot be permitted to change his position once he has elected.

In my judgment, the principles stated by Mason J apply with full force to the appellant's case. Having taken the stand that he did by his letter of 8 August 1986 he now cannot detract. His claim, if any, is confined to the recovery of the deposit he had paid and not to the land he had agreed to purchase.

- h** The right of making a choice available to an innocent party against a contract-breaker has no relevance at all to the fact pattern before us. Here the election was made by the appellant when it treated the contract as at an end and held on to the monies paid to it. No further right of election arises. So much for the respondent's submission.
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The second argument is that advanced by learned counsel for the appellant. He says that his client is entitled to retain the whole of the forfeited sum without proof of damage because of cl. 16.2 of the agreements. That clause reads as follows:

16.2 Reasonable Compensation

Both parties hereby unconditionally and irrevocably acknowledges (sic) that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the nondefaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

According to Mr Pradhan, the parties by the agreement in the foregoing clause had excluded the application of s. 75 of the Contracts Act. It was therefore not open to the respondent to demand the return of any part of the monies paid. Unfortunately for the appellant, there are two formidable obstacles over which this submission stumbles. They both have to do with the way in which these agreements are constructed. In the first place, if cl. 16.2 means what Mr. Pradhan says it means, then you can see that it contradicts cl. 8.2(b). While the latter says that the appellant must refund the balance (after deducting the 12%) the former says quite the opposite. That cannot be right. Either the appellant can only have the 12% as stated in cl. 8.2(b) or it is entitled to keep all the instalments it received because of what cl. 16.2 according to counsel appears to say. So how are these two provisions in these agreements to be construed so that they are consonant with business sense?

We think that the answer lies in adopting a harmonious interpretation that avoids an insensible contradiction. In our judgment, when these agreements are read as a whole, what cl. 16.2 means is that the 10% or 12% which is to be forfeited by the appellant is not to be challenged by the respondent as not being fair and reasonable compensation. If you look at the objective aim of the transaction you will see why cl. 16.2 was put in. Mark you, both parties knew that this was not a straightforward sale and purchase of land. As earlier rehearsed, there were other considerations here. The appellant as vendor of the land obviously did not want to face a challenge that it ought not to keep any of the sums it had received from the respondent on the ground that this was not an outright sale and purchase. That is why cl. 16.2 is crafted in the way in we find it. Hence, cl. 16.2 does not produce the effect that Mr Pradhan's ingenious argument says it does.

- a* Alternatively; and this is the second obstacle; if there is any conflict or contradiction between cl. 8.2 and 16.2, then there arises an ambiguity as to what the joint effect of these two clauses is. Since it is the appellant who relies on cl. 16.2 to justify the forfeiture, that clause should be read *contra proferentum* the appellant and the resulting ambiguity between it and cl. 8.2
- b* must be resolved in the respondent's favour. What that means is that it is not open for the appellant to keep all the monies.

What we have said thus far about the true meaning of cl. 16.2, makes it unnecessary for us to deal with the question whether parties to an agreement may contract out of s. 75. That rather interesting question must await resolution upon some future occasion.

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- The further point made by learned counsel for the appellant is that since by cl. 16.2 the respondent has agreed to a forfeiture of all sums paid, it is for the respondent to apply to the court for relief against forfeiture and to prove by affirmative evidence that it is entitled to such relief. *Stockloser v. Johnson* [1954] 1 QB 476 was relied on to support this submission. The short answer to counsel's argument is that already given in paras. 18 and 19 of this judgment. In any event, the present instance is a case of a breach of contract simpliciter. This is not a case involving the use of a contractual power of forfeiture for a collateral purpose, such as you will find in cases of building contracts. Neither is it a case where there has been the payment of a sum colourably termed as a deposit which upon closer examination turns out to be a penalty. On this point we find it sufficient once again to refer to the judgment of Lord Hailsham in *Linggi Plantations Ltd v. Jagatheesan*:
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- f* No doubt, as Cotton LJ says in *Howe v. Smith* at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See *Stockloser v. Johnson* [1954] 1 QB 476. It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.
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For the reasons already given we would allow this appeal in part and set aside so much of the High Court's order as requires the appellant to refund monies exceeding the 12% deposit. The order for costs made by the High Court is also set aside. Each party shall bear its own costs here and in the court below.

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